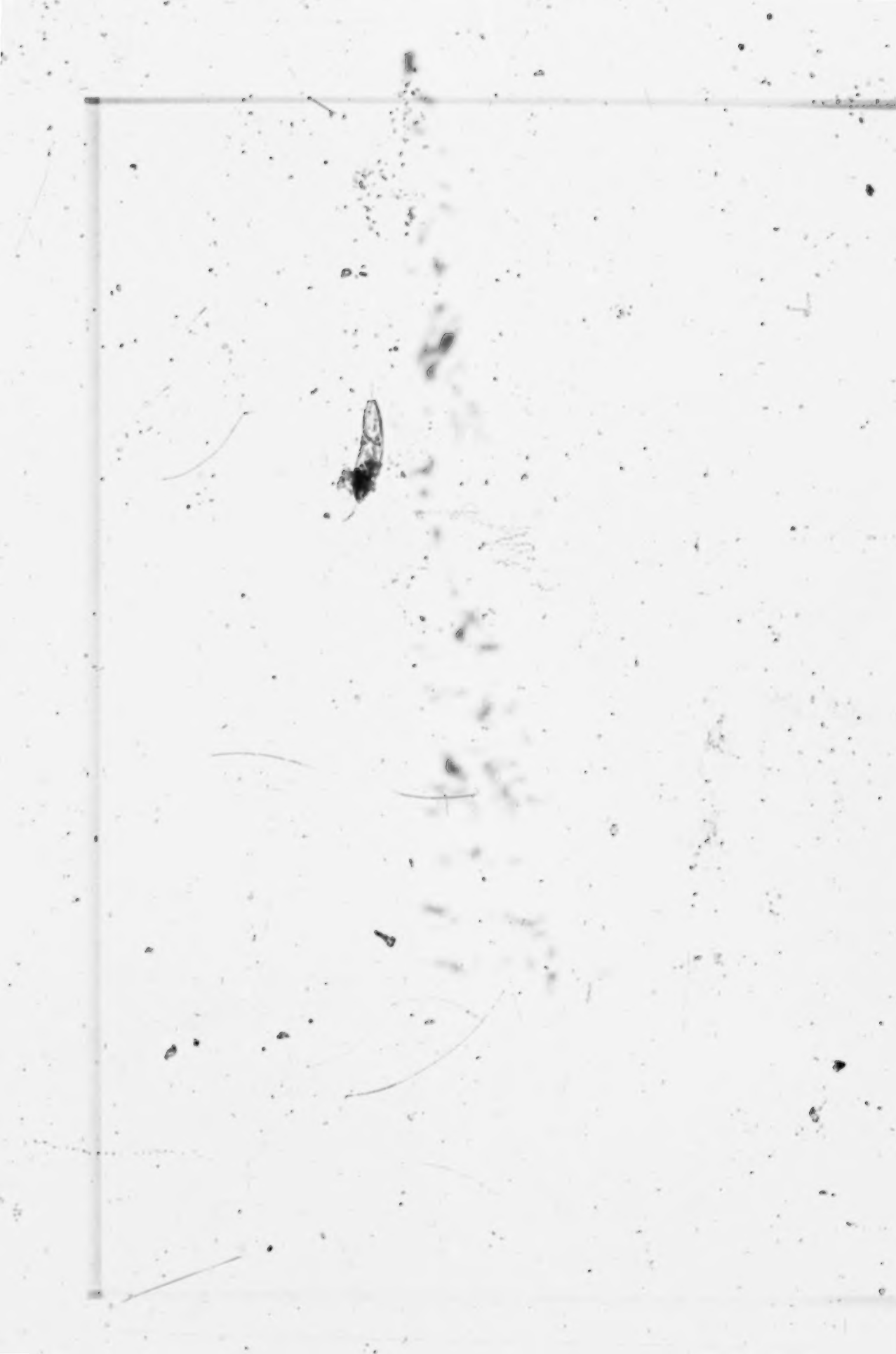

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 447

VERNON O. BARNETT,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

On Petition for Writ of Certiorari
To The Court of Criminal Appeals of Texas

BRIEF FOR RESPONDENT IN OPPOSITION

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

HAWTHORNE PHILLIPS
Executive Assistant

SAM L. JONES, JR.
Assistant Attorney General

ROBERT C. FLOWERS
Assistant Attorney General

Attorneys for Respondent
Box "R" Capitol Station
Austin, Texas 78711

OF COUNSEL:
JIM VOLLERS
State's Attorney
Court of Criminal
Appeals of Texas

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OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered on February 19, 1969, and sought to be reviewed by Petitioner, is not as yet officially reported. It is reproduced as an Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites would appear to be adequately set forth in the petition, although Respondent disputes Petitioner's contention that any rights guaranteed him by the United States Constitution have been denied.

QUESTIONS PRESENTED

Petitioner presents three questions which he asserts should be reviewed by this Court. Respondent does not accept these questions under the assumptions posed by Petitioner as being the legal questions properly presented herein and says the questions properly presented should be as follows:

1. When a search and seizure is grounded solely on the consent given by the Petitioner without his having been previously:

(a) Warned of his right to counsel,

(b) Advised that any incriminating evidence found as a result of the search could be used against him,

(c) Advised that he had the right to refuse consent,

is such search and seizure violative of the Fourth, Fifth, and Sixth Amendments as applied to the States by the Fourteenth Amendment?

2. Questions Two (2) and Three (3) as presented by Petitioner do not present proper questions for review by this Court because in each of said questions Petitoner assumes that his assumptions stated in Question No. One (1) are true. Questions Two (2) and Three (3) concerning the confession are predicated upon these assumptions being true (that Petitioner was in effect under arrest prior to the search and seizure and prior to making incriminating admissions). These assumptions are contrary to the uncontradicted evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment, and the Fourth Amendment, to the Constitution of the United States are presented to this Court for review.

STATEMENT OF THE CASE

Respondent does not accept Petitioner's "Statement of the Case" in its entirety, or the inferences and conclusions stated by Petitioner therein.

The trial record of the case shows that two officers of the Texas Liquor Control Board and J. T. Conley, a narcotic agent of the Texas Department of Public Safety, entered Walker's Auditorium in Waco and saw Leon Stewart, Albert Lee Acklin and Petitioner, Barnett, drinking beer at the bar. The three men turned toward the officers and appeared to be very nervous. Barnett pushed his unfinished drink away and said, "Let's go."

As they walked toward the door, Conley identified himself as an officer and asked Petitioner his name. He identified himself as "Spots" Barnett, and that he was a musician from San Antonio. In response to a question, he told Conley that he had been arrested once in San Antonio for barbiturates. He showed Conley his identification.

Conley had heard from agent Maroney that a "Spots" Barnett had been arrested for barbiturates in San Antonio, and Conley thought Petitioner was the same person.

Petitioner said he had come to Waco in Stewart's automobile which was just outside the door. Conley

asked him if he had anything in the car and Petitioner replied that he had a brief case that contained some contracts and personal effects. Conley asked if he could look through the brief case, and Petitioner replied: "It's Leon's (Stewart's) car. If it's okay with Leon, it's okay with me."

Leon Stewart then gave permission to search and unlocked the door and opened the door for Conley. When the door light came on Conley asked Stewart if the brief case which he saw on the car seat was his. Petitioner then spoke up and volunteered, "No, it is mine. My brief case." Conley then asked Petitioner for, and was granted, permission to look through the brief case. Petitioner opened it for the officers. Conley asked him what was in the brown paper bag which he saw in the brief case and Petitioner said: "Mr. Conley, you know what's in the bag. Marijuana."

Officer Conley testified that Petitioner was not under arrest at the time he obtained permission to search, and that after Petitioner showed his identification he would not have detained him had he tried to leave. Conley further testified that the arrest was not made until after Conley found the marijuana, a .357 Magnum pistol, and some pills.

After arresting Petitioner, Officer Conley soon thereafter took him before a magistrate, Mr. John Cabaniss, who was the Justice of the Peace.

John Cabaniss testified that he advised Petitioner:

(1) The nature of the charges against him;

(2) That Petitioner did not have to make any statement, and if he did, it could be used in evidence against him;

(3) That he did not have to give an interview with either the officers or any members of the District Attorney's staff.

(4) That Petitioner would have a reasonable time in which to get an attorney; and: "if you want to talk to one, you'll be allowed to do so shortly."

(5) That if Petitioner was too poor to hire an attorney and asked him (Cabaniss) to do so, that he would appoint one to defend him.

(6) That if he did give an interview, the law gave him the right to stop it at any time.

Thereafter, Justice of Peace Cabaniss asked Petitioner if he fully understood the warning and if he had any requests or demands. Petitioner had none. Cabaniss gave the entire warning again, and again offered to appoint counsel.

Assistant District Attorney Tatum talked to Petitioner soon thereafter and asked him if he had just been warned by Justice of the Peace John Cabaniss. Petitioner said he had.

Assistant District Attorney Tatum gave Petitioner the statement form which contained the full statutory warning in print at the top of the statement form. He explained to Petitioner that the warning which Judge Cabaniss had given him was printed on this form and would be part of any statement made by him.

Tatum asked Petitioner if he wanted to go ahead and make a statement without an attorney being present and Petitioner said he did. After statement was made Petitioner appeared to read the entire statement. Tatum testified that no promises, threats, or coercion was used to get the statement.

Officer Conley corroborated the testimony of both Judge Cabaniss and Assistant District Attorney Tatum. There was no contradictory evidence offered by Petitioner at his trial.

The Petitioner, Vernon O. Barnett, was convicted by a jury of the offense of Possession of Marijuana under Article 725b, Texas Penal Code, and his punishment assessed at a term of ten (10) years in the Penitentiary.

The conviction was affirmed by the Texas Court of Criminal Appeals in an opinion handed down by said Court and delivered on February 19, 1969. (Said opinion covering all questions presented by Petitioner for review in his Petition is attached thereon as an appendix, pages 1-12.)

ARGUMENT AND AUTHORITIES AGAINST GRANTING CERTIORARI

The basic questions for consideration of this Honorable Court are answered as follows:

(1) Petitioner was not under arrest at the time he gave Officer Conley consent to the search which resulted in the finding of marijuana.

(2) Petitioner was not under arrest at the time he made incriminating admissions at the scene of the arrest under res gestae conditions.

Gilbreath v. State, 412 S.W.2d 60 (Tex. Crim. App. 1967), states the rule:

> "Whether the accused is or is not under arrest is to be determined from the sufficiency of the facts to reasonably create the impression on his mind that he is under arrest."

Since Petitioner did not testify, only the testimony of Officer Conley and the surrounding circumstances and facts can be considered in this regard.

Officer Conley testified that Stewart, the owner of the automobile, gave permission to search and unlocked and opened the automobile door himself. When Officer Conley asked Stewart if the brief case he saw inside was his, the Petitioner, Barnett, volunteered that it belong to him.

In Petitioner's pre-trial Motion to Suppress and during the trial, the trial court properly overruled the objections of Petitioner, thus holding that Petitioner was not under arrest when the consent to search was given and oral admissions were made by him.

The trial court did not charge the jury on the question of illegally obtained evidence, as is provided for in Article 38.23, Texas Code of Criminal Procedure. No request was made by Petitioner for such charge and no complaint was made because the charge was not given.

The Texas Court of Criminal Appeals in its opinion stated: "The trial court had sufficient evidence to hold that the evidence was not obtained as a result of an illegal arrest." (Appendix to Petition, page 6) The Court further cited *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, (1966), which expressly holds that the warning on the right to remain silent and the right to counsel is required only in custodial interrogation.

(3) All rights guaranteed Petitioner by the Constitution of the United States and the Constitution and laws of the State of Texas were given to Petitioner before he gave a written confession.

The trial court properly found that both Justice of the Peace Cabaniss and Assistant District Attorney Tatum had fully warned Petitioner in accordance with Article 15.17, Texas Code of Criminal Procedure; that he was advised of his right to counsel prior to and during the making and signing of the confession; that Petitioner read and thoroughly understood the confession; and, that he knowingly, intelligently, and voluntarily waived his right to counsel. Said Court further found that the confession was not induced by any threat, coercion, deception, compulsion or any improper influence on the part of anyone toward Petitioner.

The Texas Court of Criminal Appeals in its opinion found that the trial court had sufficient evidence to hold as a matter of fact and of law that counsel was lawfully waived and that the confession was voluntary. (Appendix to Petition, page 11) Said Court found that the requirements of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, Article 38.22, Texas Code of Criminal Procedure, and *Torres v. State,* 422 S.W.2d 741, (Texas Crim. App. 1968) have been met.

CONCLUSION

The undisputed facts of this case show that a good law enforcement officer, who, based upon his good investigative experience and good instinctive reactions, carefully and lawfully pursued these instincts and thereby exposed the commission of a serious felony offense.

By the careful lawful acts of each person concerned in the investigation of this offense no constitutional encroachments were made upon the rights of Petitioner herein. The courts below have made these rulings on all contentions of Petitioner based upon prior hold-

ings of this Honorable Court and the laws of the State of Texas.

For all these good and sufficient reasons stated above, Respondent respectfully urges that the petition for Writ of Certiorari be denied.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant

HAWTHORNE PHILLIPS
Executive Assistant

SAM L. JONES, JR.
Assistant Attorney General

OF COUNSEL:

JIM VOLLERS
State's Attorney
Court of Criminal
Appeals of Texas

ROBERT C. FLOWERS
Assistant Attorney General
Attorneys for Respondent
Box "R" Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Robert C. Flowers, Assistant Attorney General of Texas, certify that a copy of the foregoing Respondent's Brief was served on the Attorney for Petitioner, by depositing same in the United States Mail, postage prepaid, certified mail, addressed to Mr. Joel W. Westbrook, 12th Floor, Alico Center, Waco, Texas 76701, on this the 29th day of August, 1969.

ROBERT C. FLOWERS
Assistant Attorney General